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Cases—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC., ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these three cases.

OPINIONS BELOW

The opinions of the court of appeals (App. A, D, G, pp. 1a–3a, 77a–79a, 163a–165a)[1] are not yet officially reported. The decisions and orders of the National Labor Relations Board are reported at 157 NLRB 1065 (*Gissel*), 166 NLRB Nos. 32 and 38 (*Heck's*), and 157 NLRB 636 (*General Steel Products*) (App. C, F, I, pp. 6a–76a, 82a–162a, 168a–217a).

JURISDICTION

The judgments of the court of appeals were entered on June 28, 1968 (App. B, E, H, pp. 4a–5a, 80a–81a, 166a–167a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit has erroneously construed the provision in Section 8(a)(5) of the National Labor Relations Act, which requires an employer to bargain collectively with the representative of a majority of his employees, by its rule that, irrespective of his other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status solely on the possession of authorization cards signed by a majority of the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in App. J, pp. 216a–217a.

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[1] Because of the length of the appendices, they have been bound in a separate volume.

STATEMENT

The three decisions of the Court of Appeals for the Fourth Circuit which this petition seeks to review present the same legal issue in different factual contexts. Rule 23(5). We shall set forth the facts in one of the cases (*Gissel*) in considerable detail, and state those in the other two (*Heck's* and *General Steel*) more briefly.

A. THE BOARD'S FINDINGS OF FACT

1. Gissel

In the summer of 1964, Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO[1] began an organizing campaign at the Company's meat packing plant in Huntington, West Virginia. The Union was obliged to suspend its campaign for several months, however, because of its participation in Board unfair labor practice hearings concerning two other employers in the same town. As soon as Company Vice President Gissel became aware of the Union's activities at the other plants, he questioned his employees Frye and Mount about their contacts with the Union, threatening to discharge them if he had any reason to suspect they had become involved (App. C, pp. 26a–27a).

The Union resumed its campaign in January 1965; by January 22 it had obtained valid authorization

[1] The Union intervened in the court of appeals, and thus is a party here.

cards[3] from 31 of the 47 employees, in the unit, a clear majority. That day, Union Representative Spencer telephoned Gissel, told him that the Union represented a majority of the employees, and requested recognition. Gissel referred Spencer to the Company attorneys. The same day, Spencer wrote Gissel confirming his telephonic request for recognition and offering to turn the signed authorization cards over to the Company "so that there will be no possible doubt as to our majority status." His letter also specified that "truck drivers" were included in the claimed unit. (App. C, pp. 16a–17a.)

In a reply dated January 26, Gissel rejected the Union's request for recognition because (1) the Union had lost an election held four years previously and the Company did not believe that there had been any change in employee sentiment since that time; (2) the Company had been advised of certain improprieties in the Union's organizing techniques, including instances of direct misrepresentation in obtaining

[3] The wording of the card (App. C, pp. 24a–25a) was as follows:

APPLICATION

Food Store Employees Union, Local #347

P.O. Box 2751 Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

The card then provided spaces for the employee to sign his name and write his address, telephone number (sometimes omitted), the name and address of his employer, and the date.

authorization card signatures;[4] and (3) the Company did not know which employees were eligible voters, and did not think that truck drivers were part of the unit.[5] The letter concluded by stating that, if the Union really believed it represented a majority, it would have petitioned the Board for an election. (App. C, pp. 17a–18a.) The Company did not seek an election.

On February 10, Spencer renewed the Union's request for recognition and again offered to deliver the signed cards to the Company. He explained that the Union had not sought an election because "[t]he coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employees is most difficult for us to combat." He concluded by announcing the Union's intention of filing unfair labor practice charges against the Company for its refusal to recognize the Union. These were filed the next day. (App. C, pp. 18a–19a.)

Gissel answered on February 12, asserting that the Union's approach only bolstered the Company's opinion that it did not represent a majority of the employees. The Union responded on February 16, again urging the Company to check the signed authorization cards, and stating that the cards would be available for inspection at any time. (App. C, pp. 19a–20a.)

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[4] No evidence to substantiate this claim was introduced at the hearing (App. C, p. 54a).

[5] The Board found that Vice President Gissel in effect acknowledged at the Board hearing that he understood that the Union was requesting the unit found appropriate in 1961 (App. C, p. 53a, n. 39). See n. 11, *infra*.

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The Company, meanwhile, had renewed its anti-union campaign. During the five-week period in which he was corresponding with the Union, Gissel interrogated employees about union activity in the plant; sought information about the union activity of specific employees; threatened to close the plant if the Union came in; promised employees benefits; and warned that there was to be "no more of this Union stuff," that the Union would not get in, and that the Union would have to "fight [Gissel] first." (App. C, pp. 27a–33a.) After learning in April of a union meeting scheduled for later that month, Gissel let it be known that the Company would send a representative there to report which employees attended. He sent someone to the meeting who reported such information to the Company. (App. C, pp. 33a–37a.) Two days after the meeting, Gissel forced Mount to admit that he attended the meeting, and then reduced both his and Frye's hours of work. Three days after this incident, Mount and Frye were discharged, to the accompaniment of derogatory remarks about the Union. (App. C, pp. 38a–48a.)

2. Heck's

By October 9, 1964, Chauffeurs, Teamsters & Helpers Local No. 175, after a brief organizational campaign, had obtained valid authorization cards from 13 employees out of a unit of 26 in the Company's Charleston area warehouses.[6] Believing that it had

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[6] The card, in relevant part, stated (G.C. Exh. 2(a)):

"Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Ware-

achieved majority status, the Union representative met that day with the Company and requested recognition. The Company president, when shown the cards, questioned one of the employees who had signed a card concerning his union membership, and thereafter responded "No comment" to the Union representative's repeated requests for recognition. The Union obtained another authorization card the next day, giving it actual majority status; it immediately filed a petition for a representation election with the Board,[7] and two days later made another demand for recognition, which the Company refused. (App. F, pp. 92a–94a, 120a–122a.)

Meanwhile, the Company embarked on an extensive anti-union campaign. It coercively interrogated the employees about their union activities, offered them help in withdrawing from the Union, threatened them with reprisals if the Union's campaign were successful, offered and gave them better jobs for opposing the Union, and discharged the leading employee organizer. (App. F, pp. 94a–100a.)

The same pattern was repeated a year later in connection with the Company's Ashland, Kentucky store, where Food Store Employees Union, Local 347, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL–CIO, obtained authorization

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housemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment."

[7] The election was not held because of the unfair labor practice charges which were subsequently filed.

cards from 21 of the 38 employees by October 5, 1965.[8] The next day the assistant store manager told an employee that he knew that the Union had acquired majority status. When the Union requested recognition on October 8, however, Company counsel questioned whether department heads were included in the unit. The Union representative replied that the Union represented a majority with or without the department heads and that he would leave it to the Company to determine whether to include them. By letter of October 11, the Union restated this position, and offered to submit the authorization cards to the Company for verification. (App. F, pp. 134a–135a, 149a.)

On October 13, Company counsel refused the request for recognition because of an alleged ambiguity in the definition of the unit, and because a "poll" taken by the Company showed that a majority of the store employees did not want union representation. No reply was ever received from the Company to another request for recognition, made on October 25. (App. F, pp. 134a, 149a–150a.) Meanwhile, the Company told employees that an employee of another Company store had been "fired on the spot" for signing a card, warned employees that the Company knew which ones had signed cards, and polled employees about their desire for union representation without giving all of them assurances against reprisals (App. F, pp. 135a–144a).

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[8] The card, in relevant part, stated (B.A. 202):

"The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours and working conditions."

("B.A." refers to the appendix to the Board's brief in the court below.)

3. *General Steel*

The Upholsterers' International Union of North America, AFL–CIO, initiated an organizational campaign among the Company's employees in the early summer of 1964, and by August 13 had obtained authorization cards from 120 of the 207 employees in the unit.[9] The Union wrote to the Company on that date requesting recognition, and the next day filed a representation petition with the Board. Company counsel responded to the Union's request on August 26, alleging doubt of the Union's majority status, and refusing to bargain "unless and until it is certified by proper authority." (App. I, p. 184a.)

Meanwhile, the Company began an anti-union campaign. It interrogated employees about their union activities, threatened them with discharge for engaging in union activities or voting for the Union, warned that strikes and other economic consequences would result from unionization, and asserted that, although it would have to negotiate with the Union, it did not have to sign anything. (App. I, pp. 174a–184a.) The Union lost the Board election by a vote of 94–85 (App. I, p. 172a).[10]

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[9] The card in relevant part stated (App. I, p. 189a):

"I do hereby designate and authorize the Upholsterers International Union of North America, AFL–CIO, and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment."

[10] The Union filed objections to the election, and the Board subsequently set it aside because of the Company's unfair labor practices (App. I, pp. 172a, 185a–186a).

B. THE BOARD'S CONCLUSIONS AND ORDERS

In each of the above cases, the Board found (1) that the Union had obtained valid authorization cards from a majority of the employees in the bargaining unit at the time of its demand for recognition,[11] and hence was entitled to represent the employees for collective bargaining purposes; and (2) that the Company's refusal to bargain was motivated not by a good faith doubt of the Union's majority status, but by a desire to gain time in which to dissipate that status (App. C, F, I, pp. 52a–58a, 118a–124a, 145a–158a, 203a–206a). It held that the refusals to bargain violated Section 8(a)(5) and (1) of the Act.

In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its anti-union campaign. Thus, in *Gissel* it found that the Company coercively interrogated employees concerning their union activities, threatened them with discharge and other economic harm, and promised them benefits—all in violation of Section 8(a)(1) of the Act; and that the Company discriminatorily discharged Mount and Frye, in violation of Section 8(a)(3) and (1) (App. C, pp. 48a–52a, 58a–68a). In *Heck's*,

[11] In *Gissel*, the Board adhered to the unit determination which it had made when the Union filed a representation petition in 1961. In directing an election on that petition, the Board found appropriate a unit of "all production and maintenance employees * * * including truck drivers, truck driver salesmen and the janitors (with the usual exceptions)." The Union lost the 1961 election (App. C. pp. 14a–15a, 52a). In *Heck's*, the Board found that the Union at Charleston had acquired majority status at least by the time of its second demand for recognition (App. F, pp. 121a–122a).

the Board found that the Company coercively interrogated employees, threatened reprisals against them for supporting the Union, created the impression of surveillance of their union activities, and offered them benefits in exchange for opposition to the Union—all in violation of Section 8(a)(1); and that the Company discriminatorily discharged the leading union adherent, in violation of Section 8(a)(3) and (1) (App. F. pp. 94a–100a, 158a–159a). In *General Steel,* the Board found that the Company interrogated employees and threatened them with reprisals, including discharge, in violation of Section 8(a)(1) (App. I, p. 207a). In neither *Gissel* nor *Heck's* was there any evidence tending to support the employer's claim of doubt that the Union represented a majority of the employees.[12]

The Board ordered the companies to cease and desist from the unfair labor practices found; to offer reinstatement and back pay to the employees who had been discriminatorily discharged; to bargain with the Union upon request; and to post appropriate notices (App. C, F, I, pp. 69a–72a, 84a–86a, 159a–161a, 208a–209a).

C. THE DECISIONS OF THE COURT OF APPEALS

In each of the above cases, the court of appeals sustained the Board's findings that the Company had engaged in restraint and coercion in violation of Section 8(a) (1) of the Act, and, in *Gissel* and *Heck's,* the court also sustained the findings that the

[12] In *General Steel,* the trial examiner considered at length and rejected allegations of misrepresentation by the union and misunderstanding by the employees of the purposes for which the cards were being solicited. The Board adopted his conclusions. (App. I, pp. 189a–203a.)

Company had discharged employees in violation of Section 8(a) (3) and (1). In each case, however, the court rejected the Board's finding that the Company's refusal to bargain violated Section 8(a) (5) and (1) (App. A, D, G, pp. 1a–3a, 77a–79a, 163a–165a). The court's reasoning, which was the same in all three cases, is illustrated by the following statement from its opinion in *Gissel* (App. A, p. 3a):

> In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[3] The reasoning elaborated in those decisions applies with equal force here, and we decline enforcement of that portion of the Board's order requiring respondent to bargain with the union.
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> [3] *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied, 36 LW 3403 * * *; *NLRB* v. *S.S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson Co., Inc.*, 4 Cir., 386 F. 2d 551; *NLRB* v. *Heck's, Inc.*, 4 Cir., * * * (decided this day).

REASONS FOR GRANTING THE WRIT

1. Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." The latter section makes representatives "designated or selected * * * by a majority of the employees * * * the exclusive representatives of all the employees * * * for the purposes

of collective bargaining." Thus, under the statute an employer has a duty to bargain with a union that represents a majority of his employees. There is a settled gloss upon the Act that an employer confronted with a union demand to bargain need not do so if he has a good faith doubt as to the union's majority status.[13]

In the past, two ways of establishing majority status have consistently been recognized by the Board and the courts: through winning an election conducted by the Board under Section 9(c) of the Act, or through obtaining signed authorization cards from a majority of the employees where employer unfair labor practices have precluded a fair election. In recent years unions increasingly have relied upon the authorization-card method of establishing their majority status; and the courts of appeals other than the Fourth Circuit generally have enforced Board remedial orders requiring employers to bargain with unions where the Board determined that the union had obtained valid authorization cards signed by a majority of employees and that the employer had no good faith doubt as to that fact.[14]

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[13] See *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914 (n. 16, *infra*), and cases cited, n. 14, *infra*.

[14] *National Labor Relations Board* v. *Sinclair Co.* (C.A. 1), No. 7069, July 3, 1968, 68 LRRM 2720, 2723; *National Labor Relations Board* v. *Quality Markets*, 387 F. 2d 20, 23–25 (C.A. 3); *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712–713 (C.A. 5); *National Labor Relations Board* v. *Southland Paint Co.*, 394 F. 2d 717, 723–724 (C.A. 5); *National Labor Relations Board* v. *Atco-Surgical Supports*, 394 F. 2d 659, 660–661 (C.A. 6); *Atlas Engine Works* v. *National Labor Relations Board*, 396 F. 2d 775, 776 (C.A. 6); *National*

In a series of recent decisions (of which these three cases are examples) the Court of Appeals for the Fourth Circuit has rejected this settled line of au-

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Labor Relations Board v. *Taitel*, 261 F. 2d 1, 5 (C.A. 7), certiorari denied, 359 U.S. 944; *National Labor Relations Board* v. *Clark Products*, 385 F. 2d 396, 398 (C.A. 7); *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 692–693 (C.A. 8); *Colson Corp.* v *National Labor Relations Board*, 347 F. 2d 128, 135–138 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 846–847 (C.A. 9); *Furr's Inc.* v. *National Labor Relations Board*, 381 F. 2d 562, 568–570 (C.A. 10), certiorari denied, 389 U.S. 840; *United Automobile Workers* v. *National Labor Relations Board and Preston Products Co.*, 392 F. 2d 801, 807, 808 (C.A. D.C.), certiorari denied, 392 U.S. 906.

The view of the Second Circuit formerly fully comported with that of these other circuits. See *National Labor Relations Board* v. *Philamon Laboratories*, 298 F. 2d 176, 179–180 (C.A. 2, per Judge Marshall), certiorari denied, 370 U.S. 919; *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 181–182 (C.A. 2). However, recently the Second Circuit, while continuing to adhere to the view that an employer violates Section 8(a)(5) of the Act where, without a good faith doubt, he refuses to recognize a union which possesses valid authorization cards signed by a majority of the employees, has split over whether the circumstance that the employer engages in other unfair labor practices is relevant to a determination of his lack of good faith in refusing recognition. See *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–208 (C.A. 2, per Judge Friendly); *National Labor Relations Board* v. *Consolidated Rendering Co.*, 386 F. 2d 699, 704 (C.A. 2, per Judge Smith); *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, 389 F. 2d 565, 568 (C.A. 2, opinion of Judge Hays), compare 569, n. 1 (concurring opinion of Judge Friendly), certiorari denied, 392 U.S. 908. Notwithstanding these differences, the Second Circuit has not adopted the position of the Fourth Circuit. *National Labor Relations Board* v. *S. E. Nichols Co.*, 380 F. 2d 438, 441, n. 1 (C.A. 2); *National Labor Relations Board* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829, 836, n. 10 (C.A. 2).

thority.[15] Instead, it has announced the general principle that "authorization cards are such unreliable indicators of the desires of the employees" (*Gissel*, App. A, *infra*, p. 3a) "that an employer is justified in entertaining a good faith doubt of the union's claims when confronted with a demand for recognition based solely upon union authorization cards" (*Heck's*, App. D., *infra*, p. 79a).[16] In practical effect, this special rule of the Fourth Circuit means that in

[15] In a fourth case, *Benson Veneer Co.* v. *National Labor Relations Board* (C.A. 4), No. 10446, July 8, 1968, 68 LRRM 2692, the primary ground of decision was that the union did not represent a majority of the employees when the company refused to bargain with it, and that the Board's contrary finding was without substantial evidentiary support. The Board has not petitioned for certiorari in that case, because that rationale involves only a factual question not warranting further review.

[16] A corollary of this principle is the rejection of the Board's rule that if, contemporaneously with or shortly after refusing the union's request for recognition, the employer engages in substantial unfair labor practices which make a fair election impossible, such conduct provides a basis for inferring that the employer did not have a good faith doubt as to the union's majority status. See *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914, where, in upholding that rule, the court explained:

> It has been held that an employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status * * *. When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act * * *. The Act provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate

that circuit, and in that circuit alone, a union may establish its majority status only by winning a Board election; and that the Board, irrespective of the employer's contemporaneous misconduct calculated to undermine the union, cannot require him to bargain with it even though it has obtained cards signed by a majority of the employees, in circumstances revealing no specific basis for employer doubt of their validity,[17] authorizing the union to represent them in collective bargaining.

Since the first of the Fourth Circuit's decisions announcing this new approach, four courts of appeals have specifically considered and rejected it. "Actually what the company is contending here is that signed authorization cards are so unreliable that it has a right to reject a request for recognition based on them and insist upon an election. We have already rejected this proposition in this circuit." *NLRB v. Sinclair Co.* (C.A. 1), No. 7069, July 3, 1968, 68 LRRM 2720, 2723. "The company has not contended that, as held by the Fourth Circuit * * * an employer is not required under any circumstances to recognize a union on the basis of a card majority. As to this we adhere to what was said in *NLRB v. S. E. Nichols Co.*, 380 F. 2d 438, 441 n. 1 (2d Cir. 1967)." *National Labor Relations Board v. United Mineral & Chem. Corp.*, 391 F. 2d 829,

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agent with which to bargain * * *. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by the union * * *.

[17] See p. 11, *supra*.

836 n. 10 (CA 2). "This Circuit, as do others, follows the rule that 'an employer cannot refuse recognition pending an election unless it doubts in good faith that the union has a majority.' * * * But see *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 1967, 386 F. 2d 562." *National Labor Relations Board v. Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712–713 (CA 5). "We note with interest the views of the Court of Appeals for the Fourth Circuit expressed in *N.L.R.B. v. S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967). * * * We do not * * * agree with the view which we think is implied in the *Logan* case, that the 1947 Taft-Hartley amendment to section 9(c) of the Act served to impose restrictions upon the powers of the NLRB to fashion appropriate remedies for employer violations of the unfair labor practice sections of the NLRA." *National Labor Relations Board v. Atco-Surgical Supports*, 394 F. 2d 659, 660 (CA 6).

The continued existence of such different rules on this important issue in labor management relations impairs the uniformity of national labor policy that the Act was designed to achieve (cf. *Garner* v. *Teamsters Union*, 346 U.S. 485, 490–491).

Moreover, the rule of the Fourth Circuit would seriously impede the establishment of successful bargaining relationships in a substantial geographical area where union organizational activity is at a peak. The Board's experience has been that an employer who declines to bargain with a union which has authorization cards from a majority of the employees

frequently engages in significant unfair labor practices designed to undermine the union's majority and to prevent it from winning an election. Such unfair practices often have such a serious impact upon the employees that their effects cannot adequately be dissipated merely by setting aside the election, which the union has lost, and holding a new one. In such circumstances, an order directing the employer to bargain often is the only effective means of remedying the other unfair labor practices the employer committed during the organizational campaign (see *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551, 556–557 (C.A. 4, concurring opinion of Judge Sobeloff)).[18]

2. The Fourth Circuit's rationale of its rule rests upon two premises, neither of which is valid: (a) that union authorization cards are inherently unreliable as an indication that the employees want the union to represent them; and (b) that Congress, in amending the Act in 1947, intended to make a Board election the only method for resolving questions about a union's majority status. See *National Labor Relations Board* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565–566, 568–570 (C.A. 4).

[18] Although the Fourth Circuit has left the door open to such orders in "extraordinary cases," where they may be used "without need of answering the question whether the union ever obtained majority status," *Heck's*, App. D, p. 79a; *National Labor Relations Board* v. *S.S. Logan Packing Co.*, 386 F. 2d 562, 570–571 (C.A. 4), it plainly considers that it, rather than the Board, is the appropriate agency to consider the extraordinariness of any given case. In this respect, too, it has usurped the Board's function, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488. See also *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 704–705.

(a) Although there have been abuses in the unions' use of authorization cards—primarily misrepresentations as to whether by signing the cards the employees were designating the union as their representative or merely authorizing it to seek an election to determine that issue[19]—it does not follow that such cards are inherently unreliable. On the contrary, for more than thirty years they have been used as a means of establishing a union's representative status under the Act. This Court has recognized the propriety of such use. In *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62—a case decided nine years after the 1947 amendments—the Court held that a State court improperly had enjoined peaceful picketing to obtain recognition for a union, because the subject matter of the suit was within the exclusive jurisdiction of the Board. The union had obtained signed authorization cards from a majority of the employees, but had not filed certain data with the Secretary of Labor or non-Communist affidavits with the Board, as the Act then required. The Court held that, although such nonfiling would have precluded the union from being certified by the Board as the representative of the employees, that fact did not make the Act inapplicable. The Court pointed out that even if the union had filed the data and affidavits, "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recog-

[19] See, *e.g.*, *Crawford Mfg. Co.* v. *National Labor Relations Board*, 386 F. 2d 367 (C.A. 4), certiorari denied, 390 U.S. 1028; *National Labor Relations Board* v. *S. S. Logan Packing Co.*, *supra*.

nition of the union would have violated § 8(a)(5) of the Act" (pp. 68–69); that nothing in the Act provided that, despite the failure to file such data and affidavits, "the union may not represent an appropriate unit of employees if a majority of those employees give it authority to do so" (p. 71); that Section 9(a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen" (p. 71); and that "[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority status" (p. 72, n. 8). This Court thus recognized that a union could ground its representative status upon authorization cards. For that was the sole basis upon which the union sought recognition, and the union's right to represent the employees was a keystone to the holding that the subject matter of the suit was preempted by the National Labor Relations Act. See also, *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702.

If in a particular case union authorization cards have been misused—although in the present cases the Board found that there had been no misuse and the court of appeals did not disturb that conclusion [20]—the proper remedy is to hold that the union did not

[20] As already stated, *supra*, p. 11, evidence of misrepresentation or misunderstanding was presented only in the *General Steel Products* case; the trial examiner and the Board found the challenged cards valid, but this ruling apparently played no part in the court of appeals' refusal of enforcement.

The standard by which the Board determines the validity of challenged cards, which was involved in three cases in which certiorari was denied last Term (*National Labor Relations Board* v. *Crawford Mfg. Co.*, 390 U.S. 1028; *Preston Prod. Co.*

represent a majority of employees when it sought recognition in that case, or that the employer—if he was aware of the infirmity—had a good faith doubt. But the fact that there are instances of misuse does not justify a court-promulgated rule that a union never may establish its majority status on the basis of such cards, or that an employer's claim of doubt as to the union's majority status must always be deemed to have been asserted in good faith when the union's claim rests upon cards.

(b) The court of appeals also erred in concluding that in the 1947 amendments to the Act Congress intended to make a Board election the sole method by which a union could establish its majority status. The House bill would have amended Section 8(a)(5) so as to make it an unfair labor practice only if an employer failed to bargain with a representative "currently recognized by the employer or certified as such under section 9."[21] But the Conference Committee rejected this proposal and left unchanged the Wagner Act provision[22] making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) does not require a Board election. It simply provides that "[r]epresentatives designated or selected * * * by the ma-

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v. *National Labor Relations Board*, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, 392 U.S. 908), is not at issue in the present cases.

[21] Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. of the LMRA (1947) 51; H. Rep. No. 245, 80th Cong., 1st Sess. 30, 1 Leg. Hist. (1947) 321.

[22] H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, 1 Leg. Hist. (1947) 545.

jority of the employees in a unit * * * shall be the exclusive representatives of all the employees in such unit";[23] it does not, however, prescribe the procedure by which the employees shall designate or select their representative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[23] To be sure, Section 9(c), which provides the procedure by which the Board certifies a union as a representative, was amended to eliminate the phrase "any other suitable method to ascertain such representatives." However, the effect of this change was merely to preclude the Board from issuing a *certification* on the basis of a card check as it had sometimes done under the Wagner Act (see S. Min. Rep. No. 105, 80th Cong., 1st Sess. 34, 1 Leg. Hist. (1947) 496). Since certification has significance to a union over and above establishing it as the representative of the employees with whom the employer has a duty to bargain—see *General Box Co.*, 82 NLRB 678, 680–682—Congress' action in changing the certification procedures was not inconsistent with its rejection of the proposed amendment to Section 8(a)(5).

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